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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 50 50

JACK O'LEE YOUNG,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITENTIARY, JOLIET, ILLINOIS,

Respondent

N WRIT OF CERTIORARI TO THE CIRCUIT COURT OF RANDOLPH COUNTY, STATE OF ILLINOIS

BRIEF FOR PETITIONER

EDWARD H. LEVI,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions involved	2
Statement	3
Specification of errors	6
Argument	7
1. The petition for the writ of habeas corpus sufficiently alleges undenied facts showing petitioner has been denied due process within the meaning of the Fourteenth Amendment	7
2. Habeas Corpus is the appropriate state remedy for petitioner and the denial of the petition for the writ by the court below was the denial to petitioner of rights protected by the Fourteenth Amendment of the Federal Constitution	14
3. No state remedy other than the writ of habeas corpus is available to petitioner for a full consideration of his allegations	22
Conclusion	25
Appendix	27
Judgment in No. 1029	27
Illinois Habeas Corpus Statute; Ill. Rev. Stat. 1945, c. 65	29
Illinois Constitutional Provision on Habeas Corpus	31
Announcement of the Illinois Supreme Court	31

Citations

Cases:

Betts v. *Brady*, 316 U. S. 455, 457, 462 (1942)	8, 12, 14
Bute v. *People*, 333 U. S. 640, 661 (1948)	20

Page

Ex parte Lange, 85 U. S. 163 (1873) 16
Ex parte Reed, 100 U. S. 13 (1879) 16
Ex parte Siebold, 100 U. S. 371 (1879) 16
Ex parte Watkins, 28 U. S. 119, 126 (1830) 16
Foster v. *People*, 332 U. S. 134, 137 (1947) 8, 20
Frank v. *Mangum*, 237 U. S. 309 (1915) 16
Harris v. *The People*, 128 I 585, 594 (1898) 18
Hawk v. *Olson*, 326 U. S. 271, 278 (1945) 10
Hedgebeth v. *State of North Carolina*, 334 U. S. (Preliminary Print) 806 (1948) 12
Herb v. *Pitcairn*, 324 U. S. 117, 127 (1945) 22
House v. *Mayo*, 324 U. S. 42, 45 (1945) 7, 9
Johnson v. *Zerbst*, 304 U. S. 458, 460 (1938) 9, 16, 19
Knewel v. *Egan*, 268 U. S. 442 at 445 (1925) 16
Loftus v. *Illinois*, 334 U. S. (Preliminary Print) 804 (1948) 20, 22
Marino v. *Ragen*, 332 U. S. (Preliminary Print) 561, 562, 566 (1947) 10, 19, 20, 22
Mooney v. *Holohan*, 294 U. S. 103, 113 (1935) 19
Morhouse v. *New York Supreme Court*, 293 N. Y. 131, 140 (1944) 20
Palko v. *Connecticut*, 320 U. S. 319, 327 (1937) 10
People ex rel. Barrett v. *Bradley*, 391 Ill. 169, 170, 171 18
People ex rel. Buchalter v. *Ragen*, 397 Ill. 515 (1947) 17
People ex rel. Georgetown v. *Murphey*, 202 Ill. 493 (1903) 15
People ex rel. Magee v. *McAnnally*, 221 Ill. 66 (1906) 2, 17
People ex rel. Maglori v. *Simon*, 284 Ill. 28, 32 (1918) 15, 17
People ex rel. Melton v. *Whitman*, 243 Ill. 471 (1910) 17
People ex rel. Swanson v. *Fisher*, 340 Ill. 250, 257 (1930) 18
People ex rel Swanson v. *Kelly*, 352 Ill. 567 (1933) 11, 17
People ex rel. Swolley v. *Ragen*, 390 Ill. 106 (1945) 17
People ex rel. Wakefield v. *Montgomery*, 365 Ill. 487 (1937) 17
People ex rel. Wayman v. *Zimmer*, 252 Ill. 9 (1911) 15
People v. *Bain*, 358 Ill. 177, 198 (1934) 10
People v. *Evans*, 397 Ill. 330, 333 (1947) 24
People v. *Green*, 281 Ill. 52 (1917) 15

Page

People v. *Krenitsky*, 296 Ill. App. 211 (1938) 24
People v. *Parcora*, 358 Ill. 448 (1943) 24
People v. *Schuedter*, 336 Ill. 244 (1929) 24
People v. *Shoffner*, 400 Ill. 174, 176, 177, 178 (1948), 10, 13, 17, 20, 23
People v. *Sullivan*, 339 Ill. 146 (1930) 24
People v. *Utterback*, 385 Ill. 239 (1944) 18
People v. *Williams*, 293 Ill. App. 92 (1937) 24
People v. *Wilson*, 399 Ill. 437, 441, 448, 450, 451, 452 (1948) 11, 17, 19, 20, 23
People v. *Wos*, 395 Ill. 172 (1946) 12
New York ex rel. Whitman v. *Wilson*, 318 U. S. 688 (1943) 22
Rice v. *Olson*, 324 U. S. 786 (1945) 12
Smith v. *O'Grady*, 312 U. S. 329, 331, 334 (1941) 7, 10, 19
Sunal v. *Large*, 332 U. S. 174, 178 (1947) 16
Thompson v. *The People*, 398 Ill. 366 (1947) 24
Tomkins v. *Missouri*, 323 U. S. 485, 488 (1945) 9
Townsend v. *Burke*, 334 U. S. (Preliminary Print) 736 (1948) 12, 13
Wade v. *Mayo*, 334 U. S. (Preliminary Print) 672, 684, 1276, 1270 (1948) 8, 12
White v. *Ragen*, 324 U. S. 760, 763, 764, 766, 767 (1945) 2, 7, 10, 17, 19, 22
Williams v. *Kaiser*, 323 U. S. 471, 477 (1945) 23
Woods v. *Nierstheimer*, 328 U. S. 211, 214 (1946) 19, 22

Constitutional Provisions Cited:

Section 7, Article Two—Illinois Constitution 9
Section 9, Article Two—Illinois Constitution of 1870 31

Statutes Cited:

Section 1, Chapter 65—Illinois Revised Statutes (1945) 15
Section 2, Chapter 65—Illinois Revised Statutes (1945) 3
Section 84, Chapter 38—Illinois Revised Statutes (1945) 8

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vs.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITENTIARY, JOLIET, ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF RANDOLPH COUNTY, STATE OF ILLINOIS

BRIEF FOR PETITIONER

This case is before the Court on a writ of certiorari granted to review the decision of the Circuit Court of Randolph County denying a petition for writ of *habeas corpus*.

Opinion Below

The Circuit Court of Randolph County did not render any opinion. The order of the Circuit Court reads "Petition for Writ of *Habeas Corpus* denied for the reason that

said petition is insufficient in law and substance. Leave granted to withdraw petition upon request." (R. 21.)

Jurisdiction

The judgment of the Circuit Court of Randolph County was entered on October 6, 1947. The petition for writ of certiorari was filed on November 28, 1947, and granted on May 3, 1948. In Illinois, the denial of a petitioner for *habeas corpus* is not reviewable by the Illinois Supreme Court. *People ex rel. Magee* v. *McAnally*, 221 Ill. 66 (1906); see *White* v. *Ragen*, 324 U. S. 760, 767 (1945). The judgment below is a final judgment rendered by the highest court of the State in which a decision could be had. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code. (Title 28, Section 1257 (3) of the New Federal Judicial Code.)

Questions Presented

The questions presented are (1) whether the allegations of the petition for writ of *habeas corpus* are sufficient to show that petitioner has been deprived of his liberty without due process of law, where the facts alleged show a denial of the request for counsel in a non-capital case under special circumstances showing petitioner was prejudiced and taken advantage of; (2) whether the writ of *habeas corpus* in Illinois is the appropriate state remedy for relief from a judgment of conviction which is void for lack of due process, so that no non-federal ground adequately supports the denial of relief by the Court below.

Constitutional Provision Involved

Section 1 of the Fourteenth Amendment to the Constitution provides, so far as is material here:

"* * * nor shall any State deprive any person of

life, liberty, or property, without due process of law . . . ."

Statement

Petitioner Jack O'Lee Young filed a petition for a writ of *habeas corpus* on October 6, 1947, in the Circuit Court of Randolph County,[1] Illinois. The petition alleged that on August 17, 1946, petitioner and his wife, Emma Katherine Young, "were arrested at St. Marys, Missouri without warrant," and "were held over night in the county jail at Perryville, Perry County, Missouri" (R. 2-3). "On a verbal promise that justice would be done," the petitioner and his wife waived extradition and, on Sunday, August 18, 1946, were "taken to the Randolph County Jail, at Chester, Illinois" by the sheriff of Randolph County (R. 3).

(R. 3) Petitioner was "held 'incommunicado' in the Randolph County Jail" for fifteen days. He "was denied his rights of securing counsel" (R. 3). He was held incommunicado from the time of his arrest of August 17th, in Missouri, until September 3, 1946, when he "was indicted, tried, convicted, sentenced all on same day" (R. 3). He "was never taken before a magistrate to have a charge formally placed against him and bail set" (R. 3). He was "subjected to the abuse and torment of both the States Attorney and the said Sheriff of Randolph County" (R. 3). The State's Attorney "threatened him and tried to force petitioner, to sign papers, waiving his rights" and "when your petitioner refused to sign his . . . rights away, the States Attorney became highly incensed and threatened your petitioner" with a long sentence in prison (R. 3).

On September 3, 1946, petitioner was taken before the court. The "States Attorney read an indictment charging Burglary and Larceny, and then petitioner was sentenced

[1] Randolph county is the county from which the petitioner was sentenced, and the Circuit Court of Randolph County was therefore an appropriate Court for the filing of the petition. Ill. Rev. Stat. (1945), c. 65, § 2.

to five (5) to seven (7) years in the Illinois State Penitentiary, at Menard, Illinois" (R. 4). "Petitioner asked for counsel, and was denied" (R. 4). He "stood mute through the rest of the proceeding" (R. 4). He made no plea (R. 4 and 5). He waived no right to counsel, and he waived no right to a jury (R. 4). He was not warned of his rights; he did not realize that a guilty plea had in fact been entered against him (R. 4). After "a plea of guilty had been entered against him, he was never warned of the consequences of such Plea" (R. 5). He did not receive a copy of the indictment "until after he had been sentenced" (R. 4). He had "been denied the aid of counsel; and access of witnesses . . ." (R. 8). His wife had been tried, sentenced, and taken to the Reformatory for Women at Dwight, "ahead of time (August 21, 1946), so she would not be available to appear as a witness in behalf of your petitioner" (R. 8).

Petitioner was named in two indictments filed on September 3, 1946 (R. 11 and 13). Each charged that the petitioner "feloniously and burglariously" entered a dwelling room and stole a variety of personal items. As to each indictment, without a jury trial and with the formal record reciting a plea of guilty, the petitioner, on September 3, 1946, was adjudged guilty and sentenced to the Illinois State Penitentiary (R. 17, 19 and Appendix A to Petitioner's Brief). The sentences were concurrent and were to run from five to seven years.

The State's Attorney, who acted as "Prosecutor, Court Reporter and Court Clerk" (R. 4), erroneously entered the sentences as running from five to ten years (R. 6, 10). Petitioner wrote to the trial judge, and received in reply an enclosed letter from the State's Attorney to the trial judge which read in part as follows: "The docket entry is from five to ten years, and that is the way that I wrote the

minutes up and prepared the mittimus. It is entirely possible that I made a mistake, but as I recall the sentence was from five to ten. If you care to write Jack Young, you could point out to him that with good behavior he would not have to serve any more on a five to ten sentence than on a five to seven sentence. It really makes no difference in the length of time he would have to serve if he conducts himself properly within the institution" (R. 10).[2] The trial judge in enclosing this letter wrote to petitioner "If you conduct yourself properly, I will write a letter to the parole board, at the end of five years, in your behalf when you become eligible for parole" (R. 9). In November, 1946, petitioner received a letter from the trial judge stating that he was "writing to the proper authorities to authorize the correction of the error of your sentence, as I am satisfied that the sentence was five to seven years, and I do not wish to see an injustice done to anyone. I thank you for calling my attention to this error" (R. 10).

The correction, however, was not made until after petitioner had mailed a petition for a writ of habeas corpus in December, 1946. (R. 6). The petition "was intercepted by the States Attorney, and was neither filed or entered on the court docket. Instead, another judge of the Circuit Court called petitioner up before him and corrected the error in the sentence" (R. 6-7; 18 and Exhibit A to Petitioner's Brief). While the formal record recites that petitioner moved the Court to correct the sentence (R. 18 and Appendix A to Petitioner's Brief), petitioner alleged that

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[2] The advice was erroneous. Under Illinois law the deduction for good behavior is from the maximum limit of the sentence. Ill. Rev. Stat. (1945), c. 38, § 807. With full good behavior allowance, a five to ten years sentence amounts to six years and three months; a five to seven years sentence amounts to four year and nine months. The rule adopted by the Department of Public Safety, pursuant to Ill. Rev. Stat. (1945), c. 108, § 45, reads "Good Time shall be computed agreeable to the Statutes of 1872"; see Smith-Hurd, Ill. Rev. Stat. (1923), c. 108, § 45.

he "had told the States Attorney that he did not *entend* to make any motions to the court, unless he was allowed first, the advice of counsel, for which The States Attorney stated, That counsel was not necessary in case of your Petitioners, And after the process had been completed, the States Attorney handed the Writ of Habeas Corpus back to your petitioner, and said that he, your petitioner, would need it no longer". (R. 7).

The petition for a writ of habeas corpus filed in the Circuit Court of Randolph County, Illinois on October 6, 1947 was denied without opinion on the same day "for the reason that said petition is insufficient in law and substance" (R. 21). No answer was filed by respondent. Petitioner filed his petition for a writ of certiorari in this Court on November 28, 1947, accompanying this petition with a motion for leave to proceed in forma pauperis. On May 3, 1948, this Court granted the motion to proceed in forma pauperis and at the same time granted the petition for writ of certiorari. (R. 21).

On May 17, 1948, this Court appointed the undersigned as counsel for petitioner.

Specification of Errors to Be Urged

1. The Circuit Court of Randolph County erred in denying the petition for the writ of habeas corpus without requiring respondent to answer and without giving to petitioner an apportunity to prove his allegations.

2. The Court below erred in not holding, on the undenied facts alleged, that petitioner is denied his liberty without due process of law by reason of a void conviction.

Argument

1. *The petition for the writ of habeas corpus sufficiently alleges undenied facts showing petitioner has been denied due process within the meaning of the Fourteenth Amendment.*

The petition for the writ of *habeas corpus*, prepared by the petitioner himself, is not skillfully drawn. Yet it alleges, with sufficient clarity to be understood, a number of facts which taken together amount to a denial of federal due process. These facts have not been denied. The respondent filed no answer to the petition. The Circuit Court of Randolph County denied the petition on the day it was filed, without affording petitioner any hearing, because the petition was "insufficient in law and substance" (R. 21). The allegations, therefore, must be taken as true. *White* v. *Ragen*, 324 U. S. 760, 763, (1945); *House* v. *Mayo*, 324 U. S. 42, 45 (1945); *Smith* v. *O'Grady*, 312 U. S. 329, 331 (1941).

The outlines of the picture presented are clear. Petitioner and his wife were arrested in Missouri on August 17, 1946, held in the county jail for one night, and then taken to the Randolph County jail in Chester, Illinois, where the petitioner was held "incommunicado" for at least fifteen days until September 3, 1946. (R. 3). Petitioner was not taken before any examining magistrate. Petitioner was not permitted to secure counsel. (R. 3). Meanwhile his wife, on August 20, 1946, was convicted and sentenced to one year's imprisonment in the Reformatory for Women. On September 3, he was indicted on two charges, tried and sentenced. Petitioner asked for counsel and was denied. (4). Not only was petitioner denied counsel, but he was also denied access to witnesses; the petitioner's wife had been sent to the Reformatory "ahead of time" so that she would not be available to appear in petitioner's behalf. (R. 8). Petitioner entered no plea at the trial; he stood "mute" after

having unsuccessfully asked for counsel. (R. 4). He did not waive his right to a jury trial; he was not given a copy of the indictments until after he had been sentenced. (R. 4). He had not been given time and opportunity to prepare his defense. (R. 5). The Court sentenced him to the penitentiary as though on a plea of guilty. The indictments charged two serious offenses of burglary for which the punishment in Illinois can be life imprisonment. (Ill. Revised Stat. 1945, chap. 38, sec. 84). Petitioner received two concurrent sentences of from five to seven years imprisonment.

Thus the petitioner asserts in part that he was denied the right to counsel in a non-capital case. The assertion is one which requires an examination of the "totality of facts" which go to make the circumstances of the "particular situation". *Betts* v. *Brady*, 316 U. S. 455, 462 (1942); *Foster* v. *People of State of Illinois*, 332 U. S. 134, 137 (1947). But unlike the petitioner in *Betts* v. *Brady*, the petitioner here has received no hearing whatsoever on his claim that the denial of counsel, in the context of a particular situation, constituted a denial of fundamental fairness violative of the Fourteenth Amendment. The awkward language of the petition "of a common man . . . not versed in legal matters" (R. 9), yet undoubtedly believing that legal words of art are required, is not the most felicitous basis for determining whether due process has been violated. Particular circumstances can best be explored only in a hearing. See *Betts* v. *Brady*, 316 U. S. 455, 457, 462 (1942); *Wade* v. *Mayo*, 334 U. S. (Preliminary Print) 672, 684 (1948).

One of the circumstances surrounding the denial of counsel to petitioner is that petitioner specifically "asked for counsel". (R. 4). See *Wade* v. *Mayo*, 334 U. S. (Preliminary Print) 672, 683 (1948). He did so at his trial, when the request was denied, but he had been denied previously "his rights of securing counsel" while he was held

"incommunicado" for at least fifteen days. (R. 3). These allegations (R. 3, 4 and 8) are subject to the fair interpretation that petitioner might have secured counsel to represent him, without appointment by the court, if he had not been held "incommunicado" and had not been indicted, tried and sentenced in one day. See *Tomkins* v. *Missouri*, 323 U. S. 485, 488 (1945). In the context of the particular situation, the specific request for counsel appears as a continuing request either to be permitted to make arrangements to hire counsel, or to have counsel appointed. Indeed the Petition for Certiorari states, apparently in amplification of what is meant by "incommunicado", that "when petitioner asked if he might make arrangements to wire his folks in Kentucky in regard to hiring an attorney, he was told it could not be allowed". (Numbered Page Two of Petition for Certiorari). The right to be represented by counsel antedates the right to have counsel appointed. See *Bute* v. *People of Illinois*, 333 U. S. 640, 661 (1948); Illinois Constitution of 1870, Article II, Sec. 9; cf. *House* v. *Mayo*, 324 U. S. 42, 46 (1945).

Petitioner was given neither opportunity nor time to prepare for his trial. The right to secure witnesses is an important part of the basic right to be permitted to defend against a serious criminal charge. Petitioner specifically alleges that he was "denied access of witnesses" (R. 8). His wife was sent to the reformatory "ahead of time" "so as she would not be available to appear as a witness". (R. 8). Petitioner's wife might have been an important witness in his behalf. She was with him when he was arrested in Missouri (R. 2), and the alleged crimes took place the day before. The right to secure witnesses and to have an opportunity to prepare is particularly important when petitioner appears as a stranger to the community and is arrested in another state. See *Johnson* v. *Zerbst*, 304 U. S. 458, 460 (1938); *House* v. *Mayo*, 324 U. S. 42, 45 (1945). It

can hardly be said that petitioner had an opportunity to prepare. Petitioner "didn't even receive a copy of the indictment until after he had been sentenced". (R. 4). See *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941). The trial moved from indictment to conviction and sentence in one day. Such lack of notice of the charge and such speed, when coupled with the denial of access to witnesses and the denial of a specific request for counsel, is not due process. If counsel is to be denied a defendant, then at the very least, the defendant must be given some opportunity and time to prepare. Cf. *White* v. *Ragen*, 324 U. S. 760, 764 (1945); *Hawk* v. *Olson*, 326 U. S. 271, 278 (1945).

Moreover the trial was perfunctory, informal and lacking in essential steps. Petitioner entered no plea, and waived no jury, yet he was adjudged guilty without a jury trial and sentenced to the penitentiary. A proceeding so defective has hardly the form of a hearing. When added to the denial of counsel, it does not have the substance of a hearing. See *Marino* v. *Ragen*, 332 U. S. (Preliminary Print), 561, 562 (1947). Neither liberty nor justice would be secure if such a proceeding could be substituted for a fair trial. See *Palko* v. *Connecticut*, 302 U. S. 319, 327 (1937).

Within limits, a state may adopt its own form for a trial. But the trial which petitioner received was a clear violation of Illinois law. In Illinois "the want of a plea is not a mere formality". *People* v. *Bain*, 358 Ill. 177, 198 (1934). The Illinois Court has held "that a plea is mandatory before the trial court has the authority to pronounce judgment". 358 Ill. 177 at 198; see *People* v. *Shoffner*, 400 Ill. 174, 176 (1948). Moreover the Illinois Statute provides that "in all cases where the party on being arraigned obstinately stands mute or refuses to plead, the court shall order the plea of 'not guilty' to

be entered on the minutes". Ill. Rev. Stat. (1945), c. 38, § 733. And in Illinois, "the right of an accused person to a jury trial is absolute to the extent that he may have such a trial by claiming it or even by withholding his consent to proceed without it". *People ex rel. Swanson* v. *Fisher*, 340 Ill. 250, 257 (1930). Petitioner was not "warned of his rights", and did not realize that a guilty plea had in fact been entered against him; he was not warned "of the consequences thereof" (R. 4). In Illinois the requirement that such an explanation be given to a defendant is "akin to the requirement that an accused shall have the right to counsel". See *People* v. *Wilson*, 399 Ill. 437, 441 (1948); Ill. Rev. Stat. (1945), c. 38, § 732; cf. Illinois Supreme Court Rule 27 A, effective September 1, 1948, in 400 Ill. No. 2.

The informal and confused nature of the trial which petitioner received is further indicated by the fact that the State's Attorney acted as prosecutor, court reporter, and court clerk, and, moreover, incorrectly entered the sentence. The State's Attoney, along with the Sheriff of Randolph County, is charged with abusing and tormenting the petitioner while he was held "incommunicado" (R. 3), and with seeing to it that petitioner's wife was unavailable as a witness in his behalf (R. 8). It was the State's Attorney who "wrote the minutes up and prepared the mittimus". (Letter of State's Attorney to Judge of Circuit Court of Randolph County, R. 10). The State's Attorney incorrectly entered the five to seven years sentence as five to ten years. In response to petitioner's letter from the penitentiary pointing out the error, the State's Attorney incorrectly advised the trial judge as to the difference between a five to ten years sentence and a five to seven years sentence (R. 10). The correction of the record, after the State's Attorney had "intercepted" (R.

6) a petition for the writ of habeas corpus, was accompanied by another denial of counsel to the petitioner (R. 7). Moreover the correction, coming after the petitioner had been taken to the penitentiary and after the term of court during which petitioner was sentenced, is of doubtful legality. See Exhibit #3 (R. 10) in the light of *People* v. *Wos*, 395 Ill. 172 (1946). These facts serve to emphasize the prejudiced position of petitioner, and they add to the denial of counsel and the other circumstances alleged, further careless disregard of petitioner's rights.

The rule of *Betts* v. *Brady*, 316 U. S. 455 (1942), requires the examination of the particular circumstances in the context of which counsel was denied. When examined, the circumstances may show that in effect there was an intelligent waiver of the right to counsel, or a hearing may produce facts concerning the actual conduct of the trial, as for example, the presence and examination of witnesses, which taken together show that the trial, whatever its defects, was not lacking in fundamental fairness. There can be no presumption that a petitioner is competent to conduct his own defense when he specifically has requested counsel. See *Wade* v. *Mayo*, 334 U. S. (Preliminary Print) 672, 684 (1948). Even if a defendant has not requested counsel, the absence of counsel under particular circumstances may make his conviction a denial of federal due process. *Rice* v. *Olson*, 324 U. S. 786 (1945); *Townsend* v. *Burke*, 334 U. S. (Preliminary Print) 736 (1948); see *Hedgebeth* v. *State of North Carolina*, 334 U. S. (Preliminary Print) 806 (1948). But in the present case petitioner can point to both a specific request for counsel (not only in open court but previously while petitioner was held "incommunicado") and to numerous circumstances showing that he has "actually been taken advantage of", and that he has been "prejudiced", and hence petitioner "does make out a case of violation of due

process". *Townsend* v. *Burke*, 334 U. S. (Preliminary Print) 736 (1948).

The allegation that petitioner was tried as on a plea of guilty without a jury, when petitioner did not plead and did not waive a jury, describes a trial which is no trial at all. The State's Attorney acted as court clerk and court reporter. See Ill. Rev. Stat., 1945; Chapter 37, Par. 163 a; Chap. 25, Par. 8, 14, 16. The State's Attorney says he "wrote the minute up and prepared the mittimus". And he entered the sentence incorrectly. Thus at the very least the trial was one of informality and confusion. It was permeated with irregularity. The absence of a court clerk, a court reporter and correct records would be fatal to any attempt to restore petitioner's rights on an appeal, where "the reviewing court is restricted to its examination to the record certified by the trial court", and where court records are conclusive and cannot be contradicted "on the memory of the judge who presided when the record was made". *People* v. *Shoffner*, 400 Ill. 174, 177, 178 (1948). But petitioner's allegations go further. They assert there was no plea and no waiver of jury. The assertion gains support when clerk and reporter are absent, when records are not kept properly, and known errors have been made.

The circumstances of this case show a petitioner denied access to witnesses, and given no opportunity to prepare his defense. The probable principal witness was made unavailable through the action of the State's Attorney. Petitioner did not receive a copy of the indictment until after he had been sentenced. Petitioner was indicted, convicted and sentenced on one day.

Moreover in the present case the request for counsel was broad and continuing. The petitioner requested he be given an opportunity to secure counsel, while he was held "incommunicado". He later asked for counsel and was denied in open court. The right to counsel here asserted

goes beyond a right to have counsel appointed. It extends to the right to be represented by counsel, and the right to make arrangements to secure counsel.

These allegations cannot be brushed aside, undenied, and without any hearing. The application of the concept of due process may be "less a matter of rule", *Betts* v. *Brady*, 316 U. S. at 462. But then this is so in order to take into account "the totality of facts in a given case". 316 U. S. at 462. Where, as here, the want of counsel results in a conviction lacking in fundamental fairness, and where the totality of facts alleged shows a trial offensive to the common and fundamental ideas of fairness and right, then judgments of conviction are void.

2. *Habeas Corpus Is the Appropriate State Remedy for Petitioner and the Denial of the Petition for the Writ by the Court Below Was the Denial to Petitioner of Rights Protected by the Fourteenth Amendment of the Federal Constitution*

The court below, which denied the petition as "insufficient in law and substance" determined, without a hearing, that petitioner had no federal right to counsel and was not denied due process of law. This determination was the commission of federal error and a denial to petitioner of his constitutional rights. It was also the only thing to be decided in determining whether or not to grant the petition. *Habeas corpus* is available in Illinois when a petitioner alleges that the denial of counsel has made a judgment of conviction void as lacking in due process of law. This is made perfectly clear by the recent per curiam announcement of the Illinois *Supreme Court in People* v. *Loftus* (1948). See Appendix D of this brief. The Announcement stands as a summary of the scope of the Illinois remedies of *habeas corpus*, writ of error and coram nobis when due process questions

are raised. It directly answers the question of the availability of *habeas corpus* when denial of counsel, together with other circumstances not appearing in the record, has resulted in a void conviction. The Announcement is decisive. In addition the Announcement is consistent with the prior Illinois development of the writ of *habeas corpus*.

The writ of *habeas corpus* is provided for both in the Illinois Constitution and in the Statutes of Illinois. Ill. Constitution, Art. 2, Sec. 7; Ill. Rev. Stat. (1945), c. 65, § 1. When the writ is sought by a prisoner held in custody by virtue of process from any court legally constituted, the Illinois *Habeas Corpus* Statute poses the question as to whether the court "has exceeded the limits of its jurisdiction" or whether the process "has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment to issue". Ill. Rev. Stat. (1945), c. 65, § 22. The Illinois Supreme Court, in its interpretation of the scope of the writ of *habeas corpus*, has made it clear that *habeas corpus* is not a substitute for the writ of error. *People ex rel. Georgetown* v. *Murphey*, 202 Ill. 493 (1903). Since *habeas corpus* cannot do service for a writ of error, *habeas corpus* is proper only when the judgment attacked can be said to be void and subject to collateral attack. Therefore the inquiry in Illinois cases has usually been: Whether the writ should issue because there has been an original defect in or a subsequent loss of jurisdiction in the court issuing the order of conviction or sentence under which the petitioner is held. Jurisdiction has become a word of art in most Illinois *habeas corpus* cases; the word "jurisdiction" as used in these cases means an inquiry into whether the judgment of conviction is void and collateral attack possible. *People ex rel. Wayman* v. *Zimmer*, 252 Ill. 9 (1911); *People* v. *Green*, 281 Ill. 52 (1917); *People ex rel. Maglori* v. *Siman*, 284 Ill. 28 (1918).

This is not an unusual development. The United States Supreme Court has similarly stated that *habeas corpus* "will not be allowed to do service for an appeal". *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). The problem in *habeas corpus* cases has been put in terms of whether the court issuing the order of confinement had jurisdiction. *Ex parte Watkins*, 28 U. S. 119, 126 (1830). Mr. Justice Stone, speaking for the Court, stated: "It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged". *Knewel* v. *Egan*, 268 U. S. 442 at 445 (1925). A distinction has been drawn between orders erroneous and orders that are void. *Ex parte Siebold*, 100 U. S. 371 (1879). It has been said that more than jurisdiction over the person and subject matter might be required; there would have to be jurisdiction to issue the particular order entered. *Ex parte Lange*, 85 U. S. 163 (1873); *Ex parte Reed*, 100 U. S. 13 (1879). Given the power to look behind the face of the judgment, such a formulation leads to an inquiry into the seriousness of the alleged defect. Defects sufficiently serious make orders void and collateral attack possible. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and see *Frank* v. *Mangum*, 237 U. S. 309 (1915) and the dissenting opinion at 347 where Mr. Justice Holmes refers to the loss of jurisdiction as not general "but particular and proceeds from the control of a hostile influence". As a matter of history, the use of the jurisdiction concept in connection with federal *habeas corpus* cases has been a part of the expended use of the writ due to the increased scope of the Fourteenth Amendment of the Federal Constitution.

The development of the writ of *habeas corpus* in Illinois has been similar, although impeded because the Illinois Supreme Court does not review the denials of petitions in lower Illinois courts, and will not itself consider petitions

which raise questions of fact. *People ex rel. Magee* v. *McAnally*, 221 Ill. 66 (1906); *People ex rel. Swolley* v. *Ragen*, 390 Ill. 106 (1945); see *White* v. *Ragen*, 324 U. S. 760, 766 (1945).

The Illinois Supreme Court has granted the writ when it appears that the committing court had no jurisdiction over the subject matter. *People ex rel. Melton* v. *Whitman*, 243 Ill. 471 (1910). It has recognized that "jurisdiction in a particular case is not only the power of the court to hear and determine but also the power to render the particular judgment entered, and every act of the court beyond its jurisdiction is void". *People ex rel. Maglori* v. *Siman*, 284 Ill. 28, 32 (1918). In the *Maglori* case, Mr. Justice Carter, in his dissenting opinion, 284 Ill. 28 at 37, stated "If jurisdiction should be defined as it has been in the opinion, then every act of the court that goes beyond the authority of the court to enter it is void". The writ of *habeas corpus* in Illinois can be used to search behind the face of the judgment and to matters not appearing on the record. *People* v. *Loftus*, Appendix D (1948); see *People* v. *Shoffner*, 400 Ill. 174, 178 (1948); *People* v. *Wilson*, 399 Ill. 437, 450-451 (1948). In developing the writ, the Illinois Court has distinguished between orders merely erroneous and safe from collateral attack, and those that are void. *People ex rel. Wakefield* v. *Montgomery*, 365 Ill. 487 (1937); *People ex rel. Swanson* v. *Kelly*, 352 Ill. 567 (1933); *People ex rel. Buchalter* v. *Ragen*, 397 Ill. 515 (1947).

Because this line of inquiry necessarily leads to a weighing of the seriousness of the alleged defect, the Illinois Court has discussed in terms of jurisdiction, the seriousness of alleged constitutional violations. The Court has considered whether the constitutional protections afforded are so major they may not be waived. In holding that a jury might not be waived, the Illinois Supreme Court stated:

"The late Judge McAllister, in a case brought before him on *habeas corpus*, where the defendants had been tried and convicted of a felony by the court, a jury having been waived by their consent, delivered an able and satisfactory opinion holding the conviction was void, and the defendants were illegally imprisoned thereunder". *Harris* v. *The People*, 128 Ill. 585, 594 (1898). Later times have brought a different result; the jury may now be waived and jurisdiction is said not to be involved. *People ex rel. Swanson* v. *Fisher*, 340 Ill. 250 (1930). But the important point is that when the protection of the jury was considered so major that waiver was not permitted, then jurisdiction was involved and the writ would lie. In *People* v. *Utterback*, 385 Ill. 239 (1944), on a writ of error, the petitioner claimed he had been denied a constitutional right to a speedy trial, and urged that this was a right which he could not waive. The Court translated the contention into the problem of the scope of *habeas corpus*, and stated "to hold, as plaintiff in error contends, that the lapse of the four months' period ousted the trial court of jurisdiction, would be to go counter to many rulings of this court made on original petitions for writs of *habeas corpus*", 385 Ill. 239 at 243. In *People ex rel. Barrett* v. *Bradley*, 391 Ill. 169, 170, 171 (1945), the Illinois Court posed the problem of *habeas corpus* in terms of jurisdiction and power to enter the order questioned and then considered the contention, raised on a petition for *habeas corpus*, that a sentence to the penitentiary of from one year to life for the crime of manslaughter was so out of proportion to the nature of the offense as to be unconstitutional.

Thus despite the language of jurisdiction, the very inquiry posed by a petition for *habeas corpus* in Illinois; namely, whether the judgment complained of is void and collateral attack possible, immediately imports into the

proceeding a determination of the federal question as to whether there has been a denial of major federal rights. A judgment obtained in violation of the fair hearing requirements of the Fourteenth Amendment is vulnerable to collateral attack in the federal courts if nowhere else. See *White* v. *Ragen*, 324 U. S. 760, 767 (1945). This vulnerability to collateral attack should by itself answer the jurisdictional question posed by Illinois *habeas corpus* proceedings. But beyond that the duty to enforce the federal right rests on the state court, and this is recognized by the Illinois Supreme Court. *People* v. *Wilson*, 399 Ill. 437, 448 (1948); *Mooney* v. *Holohan*, 294 U. S. 103, 113 (1935). A judgment "obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment" is void. *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1912); cf. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). Such a judgment can hardly be considered not void and not subject to collateral attack in Illinois *habeas corpus* proceedings once the "duty of a State court to enforce the requirements" of the Fourteenth Amendment has been recognized. *People* v. *Wilson*, 399 Ill. at 448. The response of the writ of *habeas corpus* to this duty is recognized by the Attorney General of Illinois by his Confession of Error in *Marino* v. *Ragen*, 332 U. S. (Preliminary Print) 561, 566 (1947).

To be sure, this Court has previously stated, in a case involving the right to effective assistance of counsel, that the denial of relief by the Illinois Courts could have rested on the ground that *habeas corpus* is not the proper remedy. *Woods* v. *Nierstheimer*, 328 U. S. 211, 214 (1946). Admittedly the question of the scope to be given to an ancient writ intended to safeguard liberties presents unusual difficulties when the determination must be made by a federal court about the status of the writ as it exists in a state sys-

tem. For while the writ undoubtedly has the capacity to safeguard rights as new meaning is given to the Fourteenth Amendment, there may be doubt as to whether the power has been realized. Cf. Matter of *Morhouse* v. *N. Y. Supreme Court*, 293 N. Y. 131, 140 (1944). Events since the *Woods* case, however, make clear that the writ of *habeas corpus* in Illinois has achieved full status as a remedy for relief from a judgment void for want of due process. First, the *Bute* and *Foster* cases have shown the limited nature of review by writ of error in Illinois. *Bute* v. *People*, 333 U. S. 640 (1948); *Foster* v. *People*, 332 U. S. 134 (1947). Second, the Confession of Error in the *Marino* case, showed that *habeas corpus* could not be considered confined to a limited number of jurisdictional questions but was available to raise the broad question of a judgment void for want of due process. *Marino* v. *Ragen*, 332 U. S. (Preliminary Print) 561 (1947). Third, the Illinois Supreme Court in the *Wilson* case explicitly recognized the duty of the State court to enforce the due process requirements of the Fourteenth Amendment, and distinguished between the review limited to the common law record available on writ of error and the issues presented in right to counsel cases on *habeas corpus*. *People* v. *Wilson*, 399 Ill. 437, 448, 450 (1948). Then in the *Shoffner* case, the Illinois Court took occasion "to again emphasize the distinction plainly drawn by the cases between questions reviewable on a writ of error and questio of fact that may be tried on a petition for writ of *habeas corpus* where it is claimed due process has been denied". *People* v. *Shoffner*, 400 Ill. 174, 178 (1948); see *Loftus* v. *Illinois*, 334 U. S. (Preliminary Print) 804 (1948).

Finally, the availability of *habeas corpus* as a proper remedy in Illinois for relief from imprisonment under a judgment of conviction void for lack of due process of law has been made perfectly clear by the Announcement of the Illinois Supreme Court in *People* v. *Loftus*, Appendix D,

made in September, 1948. In *People* v. *Loftus*, the petitioner claimed that the denial of counsel, in the context of a particular situation, resulted in a want of due process. The Illinois Supreme Court said that a number of grounds for the issuance of the writ of *habeas corpus* "may be found in Chapter 65 of the Illinois Statutes but the sole pertinent ground here would be confinement in the penitentiary under a judgment of conviction which is void. Such ground has been frequently upheld by Illinois Law". (Page 33 of this Br

The Illinois Court recognized that the failure to appoint counsel, if violative of the Fourteenth Amendment, would render a judgment void. The Court said "In the instant case the contention of the plaintiff in error is that under the particular circumstances, the court should have appointed counsel to defend him. If the circumstances are such to merit such duty, and the court failed in that duty, the Supreme Court of the United States has held the judgment is void for lack of due process of law." Page 35 of this Brief. "The constitution of the United States and the decisions of the United States Supreme Court are the supreme law of the land, binding up every court in the land". More specifically "habeas corpus is applicable to a situation, among others, where the judgment is void by reasons of matters not appearing in the record. The claims of the petitioner must be presented to the court, whether the circuit or supreme, by a proper petition showing facts which, if true, would render the judgment void". Page 34 of this Brief.

The petition for *habeas corpus* filed in the Court below alleges facts showing that the judgments of conviction are void by reasons of matters not appearing in the common law record. The denial of counsel, in the context of a particular situation, resulted in convictions lacking in

fundamental fairness and therefore void for lack of due process of law. This is the precise situation where the Illinois Supreme Court has stated that *habeas corpus* is applicable. *Illinois* v. *Loftus* involved the right to counsel in a non-capital case. See *Loftus* v. *Illinois*, 334 U. S. (Preliminary Print) 804 (1948). Thus there can be no doubt that in Illinois the appropriate remedy for such a complaint is *habeas corpus*.

3. *No state remedy other than the writ of habeas corpus is available to petitioner for a full consideration of his allegations.*

The availability of some other state remedy has been urged before this Court in a number of Illinois cases in explanation of the denial by courts below of relief to petitioners claiming a violation of Federal due process. See Confession of Error in *Marino* v. *Ragen*, 332 U. S. (Preliminary Print) 561 (1947); *Loftus* v. *Illinois*, 334 U. S. (Preliminary Print) 804 (1948); *Woods* v. *Nierstheimer*, 328 U. S. 211 (1946); cf *White* v. *Ragen*, 324 U. S. 760 (1945). The argument loses force when the remedy tried is plainly appropriate, for remedies need not be exclusive of each other. See *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688 (1943). In view of the Announcement by the Illinois Supreme Court in the *Loftus* case, *habeas corpus* is so clearly the appropriate remedy for petitioner, that the question of the possible existence of other remedies appears irrelevant. The Announcement must carry unusual weight because unlike more routine State Court opinions, which perhaps need not separate out the adjudication on the Federal question from the adjudication on the appropriate state procedure, the Announcement attempts to answer these questions directly. See *Herb* v. *Pitcairn*, 324 U. S. 117, 127 (1945). The Announcement makes it clear that when the denial of counsel, together with surrounding

circumstances not appearing in the record, results in a void judgment, the appropriate state remedy is *habeas corpus*.

The announcement in the *Loftus* case also makes it clear, however, that no other State remedy can serve the petitioner.

No relief can be obtained for the petitioner under the writ of error. The issues presented in the petition for *habeas corpus* are "entirely different" from the ones which could be presented under the writ of error. *People* v. *Wilson*, 399 Ill. 437, 452 (1948); *People* v. *Shoffner*, 400 Ill. 174, 178 (1948). As the Illinois Court stated in the Loftus Announcement, "the writ of error tests the record made in the case by the trial court". When "the review is had upon the common-law record, the sole matter only that may be considered by the court is error appearing upon the face of the record, and matters may not be added by arguments, affidavit, or otherwise, to supply or expand the record". Matters which do not come within the clerk's mandatory record "may be only a part of the record on review when a bill of exceptions is prayed and allowed and certified by the court". There is no bill of exceptions in this case. Such a bill would have had to have been filed within fifty days after judgment was entered. Ill. Rev. Stat. (1945), c. 110, § 259, 70 A. The request for counsel, the denial of counsel, and the surrounding circumstances could not be raised on the common law record. The inappropriateness of an appeal serves to emphasize the particular need for counsel. *Williams* v. *Kaiser*, 323 U. S. 471, 477 (1945). Common law records are most inadequate when improperly kept. Certified copies of a transcript are most difficult to secure if there is no separate court reporter.

Nor would relief be suitable for the petitioner through

the statutory motion in the nature of an application for a writ of error coram nobis.

Coram nobis is a remedy strictly limited in Illinois. It cannot be used to contradict the findings of the court. *People* v. *Sullivan*, 339 Ill. 146 (1930). It cannot be used to contradict the record. *People* v. *Williams*, 293 Ill. App. 92 (1937). It is available only to correct errors of facts of which the trial court had no notice. *People* v. *Evans*, 397 Ill. 330, 333 (1947); *People* v. *Schuedter*, 336 Ill. 244 (1929).

Specifically coram nobis is not available to a petitioner for the purpose of raising the denial of counsel. *People* v. *Parcora*, 358 Ill. 448 (1943). In the *Parcora* case, petitioner claimed in a coram nobis motion that "he stated to the court that he did not have a lawyer and desired an opportunity to secure one and requested a continuance, but that the court proceeded to trial". 358 Ill. at 449. As to this allegation, the Illinois Court said "It can scarcely be said that the court did not know that plaintiff in error was not represented by counsel, if such was true, nor that he was denied counsel when requested." 358 Ill. at 450. The allegation that petitioner did not have counsel or was denied counsel, accordingly, has been said to have "no place in the motion, which must contain facts unknown to the court when judgment was rendered." *People* v. *Kresinsky*, 296 Ill. App. 211 (1938); see *Thompson* v. *The People*, 398 Ill. 366 (1947).

The Announcement in the *Loftus* case gives added emphasis to the requirement that the allegation must be of a fact unknown to the trial court. Discussing the allegations in *People* v. *Loftus*, where the right to counsel was denied, the Illinois Court stated: "It is obvious that the writ of error coram nobis has no application. This must be addressed to the trial court, and if the trial court finds there

was some mistake of fact not shown, which would have required a different judgment, such court may allow the writ, set aside the conviction, and supply the defect. It is apparent the writ could not apply here because all the facts appear to be known." Page 36 of this Brief.

Such an announcement of the Illinois law of coram nobis leaves no basis for an assertion that the court below, which denied a petition for the writ of habeas corpus because it was "insufficient in law and substance," did so because coram nobis was available to the petitioner. Petitioner is entitled to a full consideration of his allegations and not merely to a review limited to the consideration of those facts which were unknown to the trial judge or do not contradict the record. The allegation that petitioner was denied counsel could have no place in a coram nobis petition. Allegation of other facts, as for example, the failure to plead, the lack of a jury waiver, and the irregularities of the conduct of the trial, including the use of the State's Attorney as the court clerk and court reporter, could not be made.

No remedy is available in Illinois for a full consideration of petitioner's allegations other than the writ of *habeas corpus*.

Summary and Conclusion

Petitioner was denied the right to secure counsel, by appointment or otherwise, under such circumstances as to amount to a denial of federal due process. The circumstances show that he was taken advantage of and prejudiced in a proceeding which had hardly the form of a hearing. Petitioner specifically asked for counsel and was denied. He did not plead guilty, he waived no right to a jury, and yet he was adjudged guilty without a jury and sentenced to the penitentiary. He had been held incommunicado for fifteen days from the time of his arrest to the time of his trial.

He had been denied access to witnesses. His wife had been made unavailable as a witness in his behalf. He was thus brought from one state to another, denied access to counsel and to witnesses, and then on one day indicted, tried and sentenced. The proceeding was without a plea, without a jury and with the State's Attorney acting as court reporter and court clerk and incorrectly entering the sentence. This is not due process of law, and the judgments of conviction are void. Petitioner charged the want of federal due process in the judgments of conviction in his petition for the writ of *habeas corpus* filed below. The writ of *habeas corpus* is available in Illinois where a judgment of conviction is void because federal due process has been denied. The court below denied the petition as "insufficient in law and substance." It denied the petition the same day it was filed and without an opinion. Petitioner was given no hearing and no opportunity to prove his allegations.

The judgment below should be reversed.

Respectfully submitted,

EDWARD H. LEVI,
Counsel for Petitioner.

APPENDIX A

Burglary and Larceny

No. 1029

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

JACK YOUNG

September 3, 1946—This day come the Grand Jurors, in a body, and return into open court indictment against Jack Young for Burglary and Larceny Indorsed A True Bill by Edward J. Doerr Foreman Bail Fixed at $1500.00.

The Defendant, Jack Young, appears before this Court in person and before arraignment is furnished with a copy or the indictment; together with a list of the witnesses and jurors, thereupon being duly arraigned enters a plea of Guilty.

And the Defendant, Jack Young, pleads guilty to the crime of Burglary and Larceny in manner and form as charged in the Indictment. The defendant is fully advised and admonished by the Court as to the consequences of his said plea of guilty, and still persists therein, whereupon the said plea of guilty is accepted by the Court and upon said plea of guilty, the Court being fully advised in the premises, doth find and adjudge the Defendant, Jack Young, guilty of the crime of Burglary and Larceny in manner and form as charged in the indictment, and doth further find and adjudge the value of the property stolen to be $25.00, and the age of the Defendant to be 38 years, and the said Defendant is accordingly hereby sentenced by the Court to the Illinois State Penitentiary, for a term of one year to life there to remain until discharged according to law, and the statute in such case made and provided; the Court after hearing evidence and the recommendations of the State's Attorney, fixes the minimum duration of imprisonment to be five years, and the maximum duration of imprisonment to be ten years. This sentence to run concurrently with Cause Number 1028. Mittimus order to issue.

(S.) EDWARD F. BARRIS,
Judge of the Circuit Court.

December 12, 1946—Now comes the defendant Jack Young in person and the People by David N. Conn State's Attorney and the defendant by oral motion, moves the Court to correct the sentence heretofore entered, and it being affirmatively shown that the sentence heretofore entered in this case is in error; that the Court on September 3, 1946 fixed the minimum duration of imprisonment at five years and the maximum duration of imprisonment at seven years; but that by clerical error the judgment read a maximum duration of ten years. The People interpose no objection to the motion and the Court allows the same and thereupon directs the Clerk to correct the record to read as follows: "The Court fixes the minimum duration of imprisonment to be five years and the maximum duration of imprisonment to be seven years." This sentence to run concurrently with cause No. 1028. Corrected mittimus ordered to issue.

(S.) RALPH L. MAXWELL,
Judge of the Circuit Court.

CERTIFICATE

STATE OF ILLINOIS,
County of Randolph, ss:

I, Harold Hahn, Clerk of the Circuit Court and Ex-Officio Recorder in and for said County, in the State aforesaid, do hereby certify that I am the keeper of the records, files and seal of said Court, and that said Court is a court of record, having a duly elected, qualified and acting Clerk and a seal; said court has original jurisdiction in all matters of law and equity, and as Recorder I am the custodian of the records and files of the Recorder's Office. I do also further certify that the foregoing is a true and complete copy of Order of Court in the matter of:

Burglary & Larceny, No. 1029

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

JACK YOUNG

as the same appears from the records and files now in this office remaining.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court, at my office in Chester, Illinois, this 21st day of July, A. D. 1948.

Harold Hahn, Clerk of the Circuit Court. (Seal.)

APPENDIX B

Illinois Habeas Corpus Statute; Ill. Rev. Stat. 1945, c. 65

Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every person imprisoned or otherwise restrained of his liberty, except as herein otherwise provided, may prosecute a writ of *habeas corpus* in the manner provided in this act, to obtain relief from such imprisonment or restraint, if it prove to be unlawful.

Sec. 2. Application for the writ shall be made to the court or judge authorized to issue the same, by petition signed by the person for whose relief it is intended, or by some person in his behalf, and verified by affidavit; provided, that such application shall be made to the Supreme Court or to a court of competent jurisdiction of the city or of the county in which the person in whose behalf the application is made, is imprisoned or restrained, or to a court of competent jurisdiction of the city from which said person was sentenced or committed or of the county from which said person was sentenced or committed.

Sec. 21. No person shall be discharged under the provisions of this act, if he is in custody either—

1. By virtue of process by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, unless the time during which such party may be legally detained has expired; or,

3. For any treason, felony or other crime committed in

any other state or territory of the United States, for which such person ought, by the Constitution and laws of the United States, to be delivered up to the executive power of such state or territory.

Sec. 22. If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

1. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet, by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge.

3. Where the process is defective in some substantial form required by law.

4. Where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment or arrest to issue.

5. Where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him.

6. Where the process appears to have been obtained by false pretense or bribery.

7. Where there is no general law, nor any judgment, order or decree of a court to authorize the process if in a civil suit, nor any conviction if in a criminal proceeding. No court or judge, on the return of a *habeas corpus*, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted.

APPENDIX C

Illinois Constitution, Art. 2, Sec. 7

All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great; and the privilege or writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

APPENDIX D

PER CURIAM

No. 29620—Adv. 68

PEOPLE STATE OF ILLINOIS, Defendant in Error,

v.

DONALD LOFTUS, Plaintiff in Error

The following per curiam announcement is made pursuant to the suggestion of the United States Supreme Court on June 14, 1948, in cause No. 59, October Term 1947, which is to be filed with the Clerk in said cause:

Donald Loftus, defendant, was convicted in the circuit court of McHenry County, Illinois, on four indictments, two for armed robbery, and two for burglary. On writ of error the judgments of conviction were affirmed in 395 Ill. 479. Defendant applied for *certiorari* to the Supreme Court of the United States, which was allowed, and on June 14, 1948, said court made an announcement in Cause No. 59 to the October term, 1947, of said court, the purport of which amounts to an inquiry as to the correct Illinois practice as to the manner in which lack of due process of law under the fourteenth amendment may be raised in courts of appellate jurisdiction, reviewing a conviction shown only by the common-law record.

The particular lack of due process in the present case is claimed to arise from a failure of the trial court to appoint counsel to defend plaintiff in error. The inquiry of the

court requires an expansion of the opinion originally rendered, and an examination of the general modes afforded by the Illinois law to test the validity of the conviction of a criminal offense.

In general three methods are provided: (1) review by writ of error; which is allowed in all felony cases, to the Supreme Court; (2) by petition for writ of *habeas corpus;* and (3) by the application for a writ of error *coram nobis,* or, as it is now designated, a motion under section 72 of the Civil Practice Act. And each of these methods has a distinct application, depending upon the circumstances of each particular case.

A writ of error is of ancient origin, and tests the record made in the case by the trial court. The record in the trial court may consist only of the mandatory record, *viz.*, indictment, arraignment, plea, trial and judgment. (*Cullen* v. *Stevens,* 389 Ill. 35.) This appears in the clerk's record in every case, whether there is a plea of guilty or a trial. The record may include also a bill of exceptions, which consists of all of the motions and rulings of the trial court, evidence heard, instructions, and other matters which do not come directly within the clerk's mandatory record. This may be only a part of the record on review when a bill of exceptions is prayed and allowed, and certified by the court. When this is done the record consists of all proceedings in the case from the time of the convening of the court until the termination of the trial. In the instant case the record consists of the mandatory proceedings only.

The statute provides also that it is the duty of the court to appoint counsel for the accused when he states upon oath that he is unable to procure counsel. (Ill. Rev. Stat. 1947, chap. 38, par. 730.) To this provision the exception is that in capital cases it is mandatory for the court to appoint counsel. Therefore, when the review is had upon the common-law record, the sole matter only that may be considered by the court is error appearing upon the face of the record, and matters may not be added by argument, affidavit, or otherwise, to supply or expand the record. The case must stand or fall upon the errors appearing in the record. Of course, where there is a bill of exceptions, which

includes motions, evidence, rulings on evidence, instructions, and the like, and such bill of exceptions is made a part of the record, errors may be reached by the remedy of writ of error. No bill of exceptions was saved in the present case.

The second method of reviewing a conviction of a crime, where the prisoner is under confinement, is by application for writ of *habeas corpus*. A number of grounds for the issuance of such a writ may be found in chapter 65 of the Illinois Statutes, but the sole pertinent ground here would be confinement in the penitentiary under a judgment of conviction which is void. Such ground has been frequently upheld by Illinois law, (*People ex rel. Georgetown* v. *Murphy*, 202 Ill. 93; *People ex rel. McGee* v. *Hill*, 350 Ill. 129; *People ex rel. Maglori* v. *Siman*, 284 Ill. 28; *People ex rel. Melton* v. *Whitman*, 243 Ill. 471), and by the Supreme Court of the United States. *House* v. *Mayo*, 324 U. S. 42, 89 L. Ed. 739; *Rice* v. *Olson*, 324 U. S. 786, 89 L. Ed. 1367.

The petition for writ of *habeas corpus* may be filed originally in the Supreme Court. The usual procedure has been to form an issue of law by demurrer, or motion to strike the petition, or like action, directly to the return of the officer. In either event the demurrer admits the matter well pleaded, and thus, either the facts of the petition or the return being admitted, the question of law is presented. The issues of fact cannot be determined in the Supreme Court because the law does not afford a means for the court to take testimony, so recourse must be had to the appointment of a commissioner, although no method for compensation for such commissioner has been provided by law. This omission for hearing evidence on *habeas corpus* in the Supreme Court is compensated for partially by granting original jurisdiction to the circuit courts to hear *habeas corpus* cases upon petition, and to hear evidence, and the judgment of such circuit court is a final order, but is not appealable to the Supreme Court of the State, except in extradition cases. No *habeas corpus* can operate as a writ of error. *People ex rel. Morris* v. *Hazard*, 356 Ill. 448; *People ex rel. Thompson* v. *Nierstheimer, Warden*, 395 Ill. 572.

The third method of review is commonly designated as

writ of error *coram nobis*, although now referred to as a motion, in section 72 of the Civil Practice Act. (Ill. Rev. Stat. 1947, chap. 110, par. 196.) The procedure is an ancient one, and was a process at common law used for the purpose of correcting errors of fact occurring in the trial court, which facts, if known to the court, would have resulted in a different judgment. The errors sufficient for the issuance of such writ have been cited many times, and generally included death of one of the parties prior to the judgment, infancy, coverture, insanity, fraud in procuring jurisdiction, etc. (*People* v. *Gleitsman*, 396 Ill. 499.) From the earliest time the writ has been used in Illinois, for we find a reference to it in *Sloo* v. *State Bank of Illinois*, 1 Scam. 428, where it is declared to be a settled remedy to correct mistakes of fact; and as late as *Schoers* v. *People*, 399 Ill. 428, when it was used where the evidence tended to show the accused was insane at the time of his conviction, a fact which was unknown to the trial court, and had it been known a different result would have followed.

We do not see any great complexity in the application of these various remedies to different states of facts which may occasion their use. A writ of error searches the record as it is made in court, without any aid of extrinsic circumstances. Thus, if there is but a common-law record, nothing but what is contained in the common-law record, may be examined. If the common-law record is supplemented by a bill of exceptions, so that the entire trial proceeding is recorded, any error shown by the complete record may be reached by a writ of error. *Habeas corpus* is applicable to a situation, among others, where the judgment is void by reason of matters not appearing in the record. The claims of the petitioner must be presented to the court, whether the circuit or supreme, by a proper petition showing facts which, if true, would render the judgment void. The writ of error *coram nobis* applies to the relief which would be afforded because of matters which, if known, would have changed the result, and hence is largely a matter for the trial court only.

But in any event, this court's jurisdiction on writ of

error, as distinguished from its jurisdiction or that of a lower court on *habeas corpus*, and as distinguished from that of a trial court on proceedings in the nature of writ of error *coram nobis*, is confined to a scrutiny of matters appearing upon the record made by the lower court, with or without a bill of exceptions, as the case may be. (*People* v. *Carter*, 391 Ill. 594, and affirmed sub. nom. *Carter* v. *Illinois*, 329 U. S. 173, 91 L. Ed. 172, and many other cases.) This is, of course, the general rule in State and United States courts of review where the procedure is by writ of error or appeal. *Claasen* v. *United States*, 142 U. S. 140, 35 L. Ed. 966.

In the instant case the contention of the plaintiff in error is that under the particular circumstances the court should have appointed counsel to defend him. If the circumstances are such as to merit such duty, and the court failed in that duty, the Supreme Court of the United States has held the judgment is void for lack of due process of law. (*House* v. *Mayo*, 324 U. S. 42, 89 L. Ed. 739; *Rice* v. *Olson*, 324 U. S. 786, 89 L. Ed. 1367.) The Constitution of the United States and the decisions of the United States Supreme Court are the supreme law of the land, binding up every court in the land. But, to reach this question it is necessary that a petition bring forth facts, which can be heard and tried by the court, to determine whether or not the particular facts in the case justified the claim of the plaintiff in error.

But the United States Supreme Court also makes it clear that where the record on review leaves it to conjecture whether the accused's circumstances were of such special exigency as to require counsel in a noncapital case, the State Supreme Court or other reviewing court may properly refuse to decide a question that, upon the record before it, it cannot decide; and it may leave the accused to such remedy, whether by way of *habeas corpus*, *coram nobis* proceeding under a rule of court, or otherwise, as is appropriate under the State's system of procedure. The opinion in *Carter* v. *Illinois*, 329 U. S. 173, 91 L. Ed. 172, affirmed this court's judgment in *People* v. *Carter*, 391 Ill. 594, on the ground that, although the defendant's claim

hat he was unconstitutionally denied counsel at the time of his arraignment raised a Federal question, this court was justified in refusing to entertain that question on a record insufficient to present all of the relevant facts.

In the instant case it does appear from the record that he defendant stated that "his funds were tied up" and hat the court denied his unsworn request for counsel after tating that because of circumstances in the previous cases he was disinclined to appoint counsel, which reasons are ot preserved in the record. We therefore cannot say, upon he record now before us, whether there is merit in defendant's claim of Federal constitutional right; for the trial ourt may or may not have had ample reason, grounded in matter not apparent in the record, for not appointing ounsel.

It is obvious that the writ of error *coram nobis* has no pplication. That must be addressed to the trial court, and f the trial court finds there was some mistake of fact ot shown, which would have required a different judgment, uch court may allow the writ, set aside the conviction, nd supply the defect. It is apparent this writ could ot apply here because all the facts appear to be known.

From a consideration of the scope of the several emedies allowed in Illinois to a person convicted of rime, it is clear that the error claimed in the failure f the trial court to appoint counsel is not presented so as o be allowed upon writ of error, as it does not sufficiently ppear from the record that any rights of the defendant to ounsel were refused by the court. Nor did the defendant how by bill of exceptions that he made any proper appliation to the court requiring the appointment of counsel nder the Illinois statute, so as to comply with due process.

To be precise, the position of the court is that the contention of the plaintiff in error cannot be allowed because the ecord he has tendered does not present a question for our onsideration on writ of error.